

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.99 OF 2006
 WITH
 CIVIL APPLICATION NO.113 OF 2006

Mr.Rafiq Hameed Sayyed. ..Appellant.

V/s.

The Municipal Corporation of Gr.Mumbai. ..Respondent.

Mr.Vinay J. Hegde for appellant.

Mr.Geeta Joglekar for Respondent-BMC.

CORAM: A.M.KHANWILKAR, J

DATE : FEBRUARY 10, 2006.

P.C. :

1. Heard counsel for the parties. Perused the relevant documents on record including well reasoned Judgment passed by the trial court.

2. The trial Court while dismissing the Notice of Motion has adverted to every minor aspect canvassed before it in the impugned Judgment which runs into about 24 pages. The grievance of the the appellant before this court is that the Deputy Municipal Commissioner was expected to consider representation preferred by the appellant in response to the notice issued under Section 351 of the Act, has failed to advert to the document at Sr. Nos.7,

8, 9 and 10 of the representation. Non-consideration of those documents by the said authority, has caused manifest injustice to the appellant.

3. Two questions have been raised before me in this appeal. First argument is regarding the appropriateness of the conclusion reached by the court below with reference to the existence of structure before the datum line. Relying on the documents in particular referred to at Sr.Nos.7, 8, 9 and 10 of the representation, the grievance was that the said documents were not considered by the authority at all and for which reason parties ought to have been relegated before the authorities for consideration of the documents. The court contends Ld.Counsel, could not have examined those documents as appellate court in relation to the said documents which were not considered by the first authority at all. Reliance was placed on the decision of this court in the case of **J.R.Patel V/s.The Municipal Corporation, Greater Mumbai dated 12th October, 2001** to contend that the Deputy Municipal Commissioner did not consider those documents would preclude the Civil Court before whom the case is pending for hearing to arrive at independent finding on its own merit. The unreported decision pressed into service is of no

avail as the observations made therein is in the context of provision of Section 314 of the Act.

4. Reliance was then placed on another unreported decision **dated 19th June, 1996 in Appeal from Order No. 712/96**. In this decision, this Court proceeded to clearly record that neither the authority nor the trial Court adverted to the relevant aspect or documents on record. This decision is of no avail; For, if the deputy Municipal Commissioner failed to properly consider the documents on record or to refer to some of the documents which were pressed into service, will not preclude the civil court to examine those documents on its own merit. Reliance was then placed on another decision in the case of **Narayan Megha Gohil V/s.Municipal Corporation of Gr.Bombay reported in 1994 MLJ 587**. Once again observations made in this Judgment are in the context of writ jurisdiction which was invoked by the petitioner before this court. This decision does not hold that the trial court could not have examined documents at Sr.No.7,8, 9 and 10 as is done by the trial Court in this case.

5. Much argument was canvassed that the notice issued by the authority dated 27th August, 2002 would

indicate the point in issue of existence of structure before datum line. This argument clearly overlooks the view expressed by the trial Court on analysing the said documents in paragraph-18 onwards of the Judgment in particular paragraph-21, which in my opinion is the appropriate approach adopted by the Court below. Suffice it to observe that in so far as view taken by the Court below on the basis of documents pressed into service appears to be correct.

6. The only question on which I am inclined to entertain this appeal is that the specific case of the appellant/plaintiff before the trial Court was that the land on which the suit structure is situated is owned by MIDC. Secondly, the MIDC is the Planning Authority. That fact is reinforced from the letter sent by the respondent corporation dated 17th August, 1994 Exh.H page 76. Indeed, the trial Court has considered this aspect in paragraph-32 and 33 of the impugned Judgment. However, what has been glossed over by the trial Court is that no reply was filed by the respondent Corporation to deny the fact asserted that the MIDC was the Planning Authority. The fact that MIDC was Planning Authority can be seen from the documents of the Corporation dated 17th August, 1994 Exh.H to the plaint at page 76 of the paper book.

The fact asserted by the plaintiff that the land is owned by MIDC and that MIDC is the Planning Authority has not been countered by the Corporation before the trial Court, which position is candidly accepted by the counsel for the respondent. That issue goes to the root of the matter. In the circumstances, this aspect will have to be considered. Hence, admit.

7. In so far as civil application is concerned, parties are directed to maintain status quo with regard to the suit structure till disposal of the appeal. Civil Application is disposed off on the above decision.

8. It is made clear that irrespective of the pendency of this appeal the trial court will be free to proceed with the hearing of the suit if so advised on its own merits in accordance with law uninfluenced by any observation in the impugned judgment or for that matter in the present order.